

THE EMERGING THREAT OF “MEANINGFUL USE” AUDITS

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In the past two months, numerous health care providers, including multiple podiatrists whom I represent, have received audit requests from a government contractor regarding their meaningful use attestations for 2011. Most of the doctors with whom I am working in these audits were relying on their electronic health records (EHR) software vendor to have helped them to comply with the meaningful use requirements. Unfortunately, in many instances, the doctors are realizing that there have been gaps in what the EHR vendors can or will do. Even worse, because the attestation deadlines have passed for both 2011 and 2012, it may not now be possible to remedy failures to comply for those years.

By way of background, in 2009, Congress enacted laws creating incentive payments for health care providers who implemented EHR systems in their offices. Meaningful use of EHR must be demonstrated over five consecutive years. In the first calendar year, the meaningful use period is 90 days; in the second through fifth years, it is 365 days. Each attestation period must fall within a single calendar year. For each year, the incentive payments are as follows:

First year	\$18,000.00
Second year	\$12,000.00
Third year	\$8,000.00
Fourth year	\$4,000.00
Fifth year	\$2,000.00

To receive these incentive payments, providers must “attest” each year that they have met the meaningful use requirements, meaning that they verify under oath that such has been done. As of July 2012, more than 267,000 health care providers in the United States had registered for incentive payments and, presumably, attested to receive those payments.

As is usually the case, however, when the government hands out money based on certain conditions, the government will later check to see if those conditions were fulfilled. After receiving criticism earlier in 2012 from prominent members of Congress that it was failing to oversee provider compliance with meaningful use requirements, the Centers for Medicare and Medicaid Services (CMS) recently began to audit meaningful use documentation from providers. Those audits are being conducted by a contractor, Figgliozzi & Company out of New York.

In my experience, the meaningful use audits generally begin with email correspondence from the Figgliozzi Company to the health care provider. This email, a form letter, has an attachment that asks the provider to either upload data into an email attachment, or send by regular mail, the documentation showing the provider’s compliance with the meaningful use requirements. Among other things, the provider is asked to list the name of its EHR vendor, the number of offices that the software is used in, and whether more than 80% of the medical records generated by the office are in electronic form. Typically, only two weeks are allowed for providers to respond, though Figgliozzi has granted one-two week extensions where requested. After the health care provider sends in the materials requested by Figgliozzi, there is often a followup request for additional materials; the followup requests are more detailed, specific, and technical in nature. These followup requests often require the assistance of the EHR vendor.

The meaningful use rules require providers to meet 15 “Core Measure” requirements, and pick 5 of the 10 “Menu Set” requirements. In the audits I am handling, the problems most often relate to Core Measure Nos. 14 and 15. National articles confirm this as a widespread problem. (“Meaningful Use Electronic Health Record Incentive Payment Audits: Are you ready?”, BNA’s Health Law Reporter, Volume 21, No. 46, 11/2912.)

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Core Measure No. 14 involves testing your EHR system to verify that it can transmit diagnostic testing information to another health care provider. Core Measure No. 15 specifies that the healthcare provider must “conduct or review a security risk analysis (i.e., under HIPAA), and implement as necessary and correct identified deficiencies.”

It is critical that health care providers recognize that some EHR vendors conduct the tests for Core Measure No. 14, but few, if any, will conduct the security risk analysis required for Core Measure No. 15. It is my belief that many health care providers have failed to realize this fact and thus have incorrectly (though in good faith reliance on their EHR vendor) attested to Core Measure No. 15.

The question now becomes, what can providers do who find themselves in this situation? First, because an attestation must occur in each of the three years, the security risk analysis should be completed in each of the three years of meaningful use attestation. If the first year was missed, the analysis should still be done to meet the requirements for years two and three. Unfortunately, this may not prevent providers from having to give back the incentive payment for the first year, if audited.

In my opinion, satisfying Core Measure No. 15 requires the assistance of legal and/or IT professionals. Providers for whom I have rendered this service in past years during HIPAA compliance sessions, are pleased and relieved to know that they have also met the Core Measure No. 15 requirements.

In summary, I urge all health care providers who have attested to meaningful use requirements to ensure that their documentation is in order in the event that an audit occurs. Providers should contact their EHR vendor if they lack the needed information or documentation. Providers should specifically consult with their legal and IT consultants to ensure that Core Measure No. 15 has been done, and if not, to immediately complete it. Finally, if a podiatrist is audited, he should check to see whether he has coverage through his malpractice insurance company. In many instances, insurance companies, such as PICA, will provide defense counsel to defend the audit.

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